UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

SILVER STAR EXPRESS, INC. d/b/a CD&L[1]
Employer

and Case No. 11-RC-6599

TEAMSTERS LOCAL 391, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO[2]

Petitioner

REGIONAL DIRECTORS' DECISION AND DIRECTION OF ELECTION

The Employer, Silver Star Express, Inc. d/b/a CD&L, is a Florida corporation that conducts a business operation out of a facility in Morrisville, North Carolina, where it brokers and manages a route courier pickup and delivery service for DHL, Inc. (hereinafter DHL). The Petitioner, Teamsters Local 391, a/w International Brotherhood of Teamsters, AFL-CIO, filed a petition with the National Labor Relations Board (hereinafter Board) under Section 9(c) of the National Labor Relations Act (hereinafter Act) seeking to represent a unit comprised of all full-time and regular part-time delivery drivers performing DHL contracting services out of the DHL facility in Morrisville, North Carolina, but excluding all other drivers, clerical employees, professional employees, guards and supervisors as defined in the Act.[3] A hearing officer of the Board held a hearing and the parties filed briefs with the undersigned.

[1] The Employer's name appears as amended at hearing.
[2] The Petitioner's full name appears as established by the record.
[3] There is no collective bargaining history between the parties.

As evidenced at hearing and in the parties' briefs, the sole issue is whether the DHL contract drivers are independent contractors, and thus, do not qualify as employees under Section 2(3) of the Act.[4] The Employer contends that the drivers are independent contractors, and the Petitioner contends that the drivers are employees under the Act.

I have considered the evidence and the arguments presented by the parties on the issue. As discussed below, I have concluded that the drivers are "employees" as defined in Section 2(3) of the Act. Accordingly, I shall direct an election in the unit described below. To provide a context for discussion of this issue, this decision will first provide an overview of the Employer's operations. Then it will set out an analysis of the issues presented by the parties, including a discussion of relevant law and its application to the facts presented.

I. EMPLOYER'S OPERATIONS

The Employer is one of four contractors providing DHL delivery services out of the DHL Morrisville, North Carolina, terminal. In total, there are approximately 70 drivers who work at the facility under the direction of the various contractors. The Employer has an Independent Contractor Agreement (hereinafter ICA) with only 15 of these drivers;[5] the remaining drivers work for other contractors in the facility. The Employer employs an on-site service representative at the DHL facility, who has a desk at the facility. Other than the DHL drivers and the Employer's service representative, the Employer does not employ any other employees at the Morrisville facility. However, the Employer has an office in Cary, North Carolina, where it employs drivers and other employees who follow rules and regulations that do not apply to the drivers at issue here.

[4] At hearing, after initially refusing to stipulate to the Petitioner's status as a "labor organization" under Section 2(5) of the Act, the Employer agreed to so stipulate.

[5] Currently, the Employer has twelve DHL routes with an assigned driver. The extra drivers are new hires who are riding with more experienced drivers learning the DHL system.

Sometime prior to October 2003, the Employer acquired the DHL contract in Morrisville, North Carolina, from a contractor known as NCS. Because the Employer only had 24-hour notice of the acquisition, it elected to hire all of the NCS employees as its own. In or around October 2003, the Employer required all of its employees to sign an agreement converting them to independent contractors. There is no evidence that the nature of the work performed by the drivers changed after their ostensible conversion to independent contractors in October 2003.

I will now provide a detailed discussion of the Employer's operations, including a description of the hiring/training process, pay rates and fringe benefits, daily work schedule, dress code, delivery vehicles, route assignments, tardiness/absenteeism policies and termination of the drivers' contracts.

A. Hiring/Training New Drivers

To engage new drivers, the Employer places an advertisement in the newspaper seeking independent contractors with a delivery vehicle and a clean driving record. When a prospective driver calls, the Employer schedules an interview. During the interview, the Employer describes the position. If the driver is interested in the position, the Employer conducts a criminal background check, administers a drug test, and confirms that the driver has a clean driving record.

If the driver accepts the position, he or she is required to execute an ICA with the Employer. The ICA is initially valid for a 30-day period, after which it renews on a monthly basis for an indefinite duration, unless terminated by either party. Among other things, the ICA outlines the nature of the work, the rate of pay, the tax obligations and insurance requirements for the driver. The ICA permits the drivers to perform contract services for other entities. For example, one driver testified that he has a personal delivery service and has delivered packages and/or letters to various entities during his tenure with the Employer.

Once the ICA is executed, the driver is assigned to a designated route and given a start date. As a training mechanism, the Employer places new drivers on a route with an experienced driver who then shows him or her the intricacies of the DHL system. This training can last anywhere from two to four weeks. The drivers also receive information and training from DHL on how to handle packages and security issues.

B. Route Assignments

Once hired, drivers are assigned designated routes that are created and defined by DHL based on area codes. Each route has a certain number of deliveries and pickups. Though the drivers are not specifically directed to deliver or pick up packages in a certain order, the time requirements set forth by the Employer, through its contract with DHL, leave very little room for driver discretion. There is no evidence that the drivers can refuse to make a pickup or delivery on their assigned routes without consequence. Nor is there evidence that the drivers have the right to sell all or part of their routes to another driver. However, if the route expands after assignment, the assigned driver will be afforded the first opportunity to acquire the expansion route.

Currently, only one DHL driver operates two routes. The remaining drivers are assigned to one route. The driver who operates two routes testified at hearing that he has hired another driver to operate his second route. The secondary driver was required to meet the Employer's job requirements, which includes a clean criminal and driving record. In addition, the secondary driver receives a 1099 tax form from the primary driver and is labeled as an independent contractor. The driver pays the secondary driver; there is no evidence that the Employer has input into the amount of these wages. The driver instructs his secondary driver, and if any issues arise relating to the performance this driver, the Employer addresses the issue with the primary driver, who then speaks with the secondary driver.

C. Daily Work Schedule

Drivers work Monday through Friday and have the option, on a rotating basis, to work one of three routes on Saturdays. Most of the drivers accept Saturday work. However, in the event a driver declines Saturday work, the Employer would ask another driver to perform the work. Drivers who elect to work on a Saturday earn a flat rate of $75 for the day. If drivers are unable to report to work on a particular day, it is their responsibility to hire a courier to cover their route. It is also possible to request a substitute driver, who is directly employed by the Employer, to fill in for drivers when necessary. In addition, the Employer's service representative at the facility will fill in for drivers when they do not report to work.

Drivers are expected to report for duty at 6:15 a.m., which is the approximate time that DHL starts the conveyor belt and begins disbursement of the packages. Drivers are expected to work through 6:00 p.m., which is the latest time a DHL customer can request service.

Upon reporting to the terminal at 6:15 a.m., drivers go to an office and sign for a scanner. DHL provides the scanners, which contain the delivery and pickup information for the various packages. In addition, the scanners allow for communication between the Employer and drivers throughout the work day. For example, scanners have been used to message drivers and inform them that their pickups have been moved around for that day. The scanner has also been used to inquire about proof of delivery and late delivery information.

Once the drivers pick up their scanners, they proceed to the conveyor belt to begin pulling their packages. The drivers pull and scan their own packages from the conveyor belt, prioritize their routes, and load their vehicles. The drivers do not receive any guidance or instruction from the Employer concerning how to load their vehicles.

Once all 70 drivers have accounted for their routes, DHL allows the drivers, including those at issue here, to download the information they need for their routes and head out for the day.

DHL sets time requirements for the delivery of packages for the Employer's drivers. The current time requirements are 10:30 a.m., 12:00 noon, 3:00 p.m. and 5:00 p.m. One driver testified that he typically finishes his morning route by 12:00 noon. At that time he will go to lunch and relax. He keeps his scanner close during the break just in case he receives a text message requesting his services. The driver testified that he generally reports back to work around 4:00 p.m. to begin pickups. He then returns the pickups and remaining packages to the terminal around 6:00 p.m., drops off his scanner, and then departs for the day.

D. Pay Rates and Fringe Benefits

Drivers are paid a flat daily rate pursuant to their ICA. The rate of pay under the ICA does not fluctuate based on the volume of packages. The Employer's Morrisville DHL Terminal Manager testified at hearing that there is "not a whole lot" of room for negotiation between the Employer and driver regarding payment under the ICA. As of today, none of the drivers performing DHL services have received compensation greater than what was initially offered at the time they executed their ICA. Every Monday, drivers are required to submit their bill to the Employer for settlement of their account on Friday.

As discussed earlier, the drivers do not receive any fringe benefits from the Employer. Specifically, the drivers do not receive health insurance, vacation/sick days, bonuses, pension/retirement benefits, unemployment compensation, workers' compensation or any other benefits. In addition, the Employer does not make any tax deductions from the drivers' payments. Instead, the driver is required under the ICA to pay all taxes and governmental (federal, state or local) contributions.

Drivers are required to maintain Occupational Accident insurance. The Employer offers this insurance coverage through the Gallagher Courier Program (hereinafter Gallagher). Drivers can elect to purchase insurance through Gallagher. If drivers elect not to participate in the Employer-provided plan, they are required to purchase their own insurance. If the drivers do elect to participate, the weekly premium is automatically deducted from their pay. The drivers cannot directly negotiate with Gallagher for a lower premium, as Gallagher offers a set price. Currently, all 15 drivers participate in the Gallagher program.

The Employer carries certificate liability insurance that insures each package that is delivered. Thus, if a driver loses a package, the Employer's insurance would cover the loss.

E. Delivery Vehicles

As discussed earlier, the Employer seeks drivers with access to a delivery vehicle. If a driver owns a delivery vehicle, he or she is responsible for maintenance and repairs, inspections, insurance and fuel.

If a driver does not own a vehicle, however he or she has the option of leasing a vehicle from the Employer. Currently, the Employer has a lease agreement with Ryder through which it leases vehicles to drivers through a "Truck Lease Agreement" (hereinafter Truck Agreement). The Truck Agreement allows drivers to lease a vehicle for a flat rate that includes repairs and insurance. The lease payment is deducted from the driver's checks. As of the date of the hearing, 5 of the 15 drivers owned their owned vehicles. The remaining drivers leased their vehicles from the Employer through its agreement with Ryder.

Whether drivers own or lease their vehicles, they are required to have their vehicle painted with the DHL logo. The Employer pays for the painting of the vehicle and is then reimbursed by DHL. Drivers are allowed to take their vehicles home in the evenings, however, once the vehicle is painted with the DHL logo, the driver cannot use the vehicle for personal use.

F. Dress Code

When on duty, drivers are required to wear a DHL uniform, hat and badge. In addition, DHL requires the driver to be clean shaven.

G. Tardiness/Absenteeism/Termination

There is no evidence that the Employer maintains a policy regarding driver tardiness or absenteeism. Furthermore, there is no evidence that the Employer makes payment deductions because of tardiness or absenteeism. However, the Terminal Manager testified about the effect of a tardy driver on the operation. Specifically, he testified that when the conveyor belt runs in the morning, it is important that drivers be present to pick up their packages so that the packages do not pile up at the end of the belt. The higher the pile gets at the end of the belt, the longer other drivers have to wait before they can leave the facility to begin their routes. Thus, if a driver is consistently late, making it difficult for the Employer to meet DHL's time requirements, the Employer would have to seek another able driver. In regard to drivers leaving early, the Terminal Manager testified that a driver's failure to complete his or her route, that is leaving early without completing the assigned route, could cause a service failure, which would be taken very seriously. He testified that this type of conduct would be similar to "walking off the job."

When the Employer first acquired the DHL operation and hired the NCS employees, it discharged two employees because they were failing to meet service requirements following counseling. Since the ostensible conversion of the employees to independent contractors in October 2003, only one driver has been terminated; that termination stemmed from alleged fraudulent conduct. There is no evidence in the record that the Employer has terminated or replaced a DHL driver due to performance issues since October 2003.

If a customer service issue arises, DHL or the Employer may contact the driver through the text messaging system in the scanner. Generally, when customers raise service issues they

contact DHL directly. At that time, DHL will then contact the Employer or the driver to address the issue. If the Employer is contacted directly, the service representative will review the driver's manifest, which contains information on each of the stops the driver has made, then he will check the particular shipment and try to get feedback back to DHL. Though DHL cannot terminate drivers, they can assert that the Employer is in breach of contract if the Employer fails to address customer service issues caused by drivers.

Having provided an overview of the Employer's operations, I will now set out an analysis of the facts presented herein, including an in-depth discussion of the appropriate standard and applicable Board law.

II. ANALYSIS

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." Below I will provide a discussion of the appropriate standard under which the Board analyzes the employee/independent contractor distinction.[6]

A. Appropriate Standard

The United States Supreme Court ruled that the applicable standard for distinguishing the terms "employee" and "independent contractor" as set forth in the Act, is the common-law agency test. NLRB v. United Insurance Company of America, 390 U.S. 254, 256 (1968). When analyzing the employee/independent contractor distinction under the common-law agency test, the Board looks to Restatement (Second) of Agency, Section 220 (hereinafter Restatement). The Restatement provides that the relevant factors include:

[6] During the hearing, the Employer cited a decision from a Florida administrative agency in which the Employer's drivers were found to be independent contractors. In addition, the Employer cited two United States District Court decisions, one at hearing and one in its brief, for the proposition that the drivers in the instant case are independent contractors. As the cases cited do not involve an interpretation of the Act or Board law, this decision will not give any weight to the arguments set forth therein.

(1) the extent of control, which, by the agreement, the master may exercise over the details of the work;
(2) whether or not the one employed is engaged in a distinct occupation or business;
(3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(4) the skill required in the particular occupation;
(5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(6) the length of time for which the person is employed;
(7) the method of payment, whether by the time or by the job;
(8) whether or not the work is part of the regular business of the employer;
(9) whether the parties believe they are creating the relation of master and servant;
(10) whether the principal is or is not in the business.

All of the above factors and "… incidents of the relationship must be assessed and weighed with no one factor being decisive." United Insurance, 390 U.S. at 258. Thus, the examination is fact-intensive, and one must look at the totality of the circumstances.

Through the years, the Board has developed a line of cases that examine the employee/independent contractor distinction. Two of the lead cases in this area are Roadway Package System Inc., 326 NLRB 842 (1998), and Dial-A-Mattress Operating Corporation, 326 NLRB 884 (1998). As the facts in Roadway are similar to the facts presented herein, I will first provide a detailed account of the Roadway case. I will then briefly discuss the Board's distinction between the drivers in Roadway, who were found to be employees, and the drivers in Dial-A-Mattress, who were found to be independent contractors.

In Roadway, the Board reaffirmed its reliance on all of the common-law agency principles to differentiate between an employee and independent contractor, and rejected the employer's assertion that greater weight should be given to right-to-control factors. Roadway, 326 NLRB at 850. The employer in Roadway operated a delivery service in which drivers delivered packages under contracts whose duration ranged anywhere from 1 to 5 years, with renewal clauses, depending on the duration date selected by the individual drivers. Once under

contract, drivers were assigned a primary service area and could not refuse to accept or deliver packages in their primary service area.

The drivers' workweek ran from Monday through Friday, and the drivers averaged about 9½ hours per day. There was not a scheduled start time, but drivers were required to have their vehicles present in the early morning hours at the terminal if they wanted the employer's package handlers to load their vehicles for the day. Failure to make the delivery vehicle available in the morning would result in the driver having to load his or her own vehicle.

When performing their contractual duties, drivers were required to wear a uniform with the employer's logo. Some of the uniforms also displayed the driver's name.

The drivers owned or leased their own delivery vehicles. Nearly all of the drivers obtained their new vehicles through a third party with whom the employer had an established business relationship. The employer often put new employees in touch with former employees if they were looking for a used delivery vehicle. If an individual's vehicle was out of commission on a particular day, the employer assisted in providing a replacement vehicle.

Drivers were responsible for maintaining their own vehicles. However, the employer offered "a business support package" to help the drivers meet their requirements under their contract. The drivers were required to use vehicles that met the strict specifications set forth by the employer. The vehicle specifications included, among other things, using a particular make and model, and using the employer's color scheme and logo. Drivers could use their vehicles for other commercial or personal purposes. However, they were required to mask all numbers, marks, logos and insignia identifying the employer.

The drivers' contracts permitted them to operate more than one vehicle, hence more than one route, with the employer's consent. The driver could use additional persons to help service the second route. However, the personnel hired by the drivers were not employees of the

employer, and the driver was solely responsible for the expenses associated with using the additional personnel.

Drivers were responsible for their own federal, state and local taxes. The employer did not offer paid holidays, vacations, disability or retirement benefits to the drivers.

The contract purported to give the drivers the right to sell part, or all, of their service route, or receive minimum compensation for customer accounts that were reassigned or removed from their service area, thereby giving the drivers a proprietary interest in their route.

Based on the facts above, the Board ultimately concluded that the drivers were employees. In so concluding, the Board found that the drivers were employees because: (1) they devoted a substantial amount of their time, labor and equipment performing essential functions that helped the employer compete in the delivery service arena; (2) the drivers were not required to have prior training or experience; (3) the drivers all wore uniforms and drove vehicles with the employer's logo; (4) the employer indirectly helped the drivers facilitate the purchase of the drivers' delivery vehicles; (5) the drivers had to overcome several obstacles if they wanted to use their vehicles after hours for personal use; (6) the employer regulated the drivers' pay and compensation; (7) drivers were expected to report to work every day; and (8) the drivers did not have a proprietary interest in their routes.

The Roadway decision issued simultaneously with the Board's decision in Dial-A-Mattress, in which the Board found a class of drivers to be independent contractors. Dial-A-Mattress, 326 NLRB at 894. The Board distinguished the drivers in the two cases on several grounds. First, the Board found that the drivers in Dial-A-Mattress, unlike the drivers in Roadway, had the ability to make "…an entrepreneurial profit beyond a return on their labor and their capital investment." Id. at 891. More specifically, drivers in Dial-A-Mattress, were permitted to perform additional work for the employer's customers to whom they were

delivering for separate payment. Second, addition, the drivers were able to negotiate different payment rates. For example, several of the Dial-A-Mattress drivers were able to negotiate special rates for deliveries in certain geographical zones. Third, unlike the Roadway drivers, the Dial-A-Mattress drivers did not receive a minimum compensation. Fourth, several of the drivers in Dial-A-Mattress employed their own employees and operated as corporations.

Other critical differences between the drivers in the two cases include that the Dial-A-Mattress drivers had the ability to refuse deliveries; use a delivery truck that was devoid of employer insignia; and choose whether to be available each work day.

Recently, the Board reviewed the distinction between employee/independent contractor in Argix Direct, Inc., 343 NLRB No. 108 (2004) and concluded that a class of drivers were independent contractors. In Argix, the Board found that the drivers were independent contractors because: (1) the drivers were solely responsible for their own delivery vehicles; (2) the drivers' delivery vehicles did not have to meet any specifications; (3) the employer did not place any restrictions on the personal use of the delivery trucks; (4) the contract between the employer and drivers permitted the driver to provide services for other carriers in their delivery vehicles; (5) drivers could hire and supervise secondary drivers to operate their vehicles; (6) drivers were not penalized if they elected not to work; (7) drivers maintained discretion over their work schedules; (8) drivers were not guaranteed a minimum income – but instead had the flexibility to minimize or maximize their income; (9) drivers were responsible for their own expenses and did not receive any benefits; and (10) there was no progressive disciplinary system and discharge rules for the drivers. Argix, 343 NLRB No. 108, slip op. at p 4-5.

B. Application of the Appropriate Standard to the Facts

As stated above, the Board uses the common-law agency test to analyze employee/independent contractor status. The party asserting independent contractor status bears

the burden of showing that the classifications in question are those of independent contractors. BKN, Inc., 333 NLRB 143, 144 (2001). A review of the facts presented herein under the factors outlined in the Restatement, clearly demonstrates that the Employer failed to meet its burden.

1. The extent of Employer control.

In the present case, the Employer exercises a great degree of control over the details of the drivers' work including work assignments, schedules, the tools used for carrying out the work assignments, and dress requirements.

In regard to work assignments, the Employer assigns the drivers a defined route. Though the drivers may have options about the order in which they deliver packages, there is no evidence that they have the authority to re-define or change their routes. In contrast, the drivers found to be independent contractors in Argix did not have set routes, but merely provided service in a particular geographical zone. In addition, there is no evidence that the drivers here can refuse to accept a pickup or delivery on their route without consequence. In this regard, although the Terminal Manager testified that a driver could in fact reject work, he would not thereafter confirm whether that individual would remain as a driver with the Employer if he or she engaged in such conduct. I find that the reasonable inferences to be drawn from this testimony provide that a driver's refusal to perform assigned work would result in an adverse employment consequence. The Employer, therefore, exercises significant control over the driver's daily work assignments.

In regard to work schedules, the drivers herein are expected to report to work at 6:15 a.m. and to work through 6:00 p.m. Concerning start times, the one driver who testified at hearing indicated that there are drivers who report late without consequence. Though a driver may report late from time to time, the Terminal Manager's testimony clearly demonstrates that drivers are expected to report in a timely fashion and that failure to do so on a consistent basis would be

a serious offense, because it would affect the quality of service provided to DHL. In regard to being available until 6:00 p.m., the Terminal Manager went so far as to equate a driver's incompletion of his or her route to an employee's "walking off the job."

Even assuming arguendo that the drivers did have reporting flexibility, the Board has found that this does not necessitate a finding of independent contractor status. Thus, the drivers in Roadway did not have a designated start time. That is, they were simply required to have their trucks at the facility in the early morning hours if they did not want to be responsible for loading their own trucks. Even in the absence of a designated start time, however, the Board found drivers similar to those herein to be employees, not independent contractors.

In regard to the Employer's control of the tools used by the drivers, the Employer imposes the requirement that drivers use a delivery vehicle that is painted with DHL colors and logo. Once the vehicle meets these specifications, the driver can no longer use that vehicle for personal use. Thus, the Employer imposes control over the appearance and use of the drivers' delivery vehicles. In contrast, in Dial-A-Mattress and Argix, the drivers had free reign concerning the color and design of their trucks and could use their trucks at all times for personal use.

Finally, like the drivers in Roadway, the drivers here are required to wear uniforms and be clean shaven. There was no such uniform requirement for the drivers in Dial-A-Mattress.

2. Whether the drivers are engaged in a distinct occupation or business.

In Argix, the drivers clearly operated their own distinct businesses. Specifically, a majority of the drivers placed their own names, addresses, and/or logos on their delivery vehicles. Similarly, in Dial-A-Mattress, many of the drivers maintained their own business certificates with the state and organized as corporations. Furthermore, the drivers maintained business checking accounts, had their own company work uniforms, filed corporate tax returns,

maintained workers' compensation insurance for their employees and had business tax identification numbers.

In contrast, the record here does not establish that the drivers here engage in their own distinct occupation or business. The drivers all wear DHL uniforms and drive vans with DHL colors and logos. They work out of the DHL warehouse, use scanners supplied by DHL, and perform pickup and delivery services Monday through Friday for DHL customers. Although the one driver who testified at hearing stated that he had conducted his own delivery business prior to joining the Employer and that he continued this after becoming a driver at the Employer's DHL facility, he further explained that once his vehicle was painted with the DHL colors and logo, he could no longer use it for his personal business. The scope of this driver's personal business at the time of the hearing is not clear from the record. Moreover, there was no evidence presented that any of the other fourteen drivers conduct a distinct occupation or business. Thus, the one driver who testified about his personal business appears to be an exception to the norm.

This same driver did employ a secondary driver who was assigned to service her own route. This secondary driver, however, was subject to the same work requirements as the other drivers. Although the ability to hire one's own employees can be an indicium of independent contractor status, see Argix, 343 NLRB No. 108, slip op. at 8, this factor alone does not mandate a finding of independent contractor status. See Roadway , 326 NLRB at 845 (Board finds drivers who employed additional drivers and helpers to be employees rather than independent contractors); Slay Transportation Company, 331 NLRB 1292, 1294 (2000) (same). Moreover, the Board has noted that "the same set of factors that was decisive in one case may be unpersuasive when balanced against a set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual

background leads to an analysis that makes that factor more meaningful in one case than the other." Austin Tupler Trucking, 261 NLRB 183, 184 (1982), quoted in Roadway, 326 NRLB at 850.

3. Whether the drivers' occupation is usually performed under the direction of an employer or by a specialist without supervision.

The Employer failed to present evidence that the type of work performed by the drivers is normally performed by a specialist without supervision as opposed to an employee working under the direction of an employer. As there is clearly no specific expertise required to be hired by the Employer, the drivers do not qualify as specialists.

4. The degree of skill required.

There was no evidence presented that the Employer requires the drivers to possess a specialized degree of skill. The drivers are simply required to have a delivery vehicle, pass a drug test, and have both a clean criminal and driving record. None of these requirements rise to the level of a specialized skill.

5. Whether the Employer provides the drivers with the tools and place of work.

As of the date of the hearing, the Employer provided a majority of the drivers with vans. Only five of the drivers owned their own delivery vehicles; the remaining drivers leased their delivery vehicles through the Employer.[7] As discussed earlier, the Employer leases vehicles from Ryder and then leases the trucks to the drivers. The lease from Ryder provides for the maintenance and repair of the vehicles. Though the Terminal Manager testified at hearing that the agreement with Ryder is set to expire at the end of April 2005, at this time, the Employer is providing, to a majority of the drivers, the main instrumentality needed to complete their work.

Likewise, in Roadway, the employer assisted the drivers in obtaining vehicles either through a third-party broker or through former employees.

The present case differs from Argix , in which the employer did not sell or lease any of the vehicles to the drivers. Thus, the drivers in Argix were solely responsible for obtaining their own delivery vehicles.

In addition, the drivers here are provided with the scanners and uniforms needed to complete their route, similar to the drivers in Roadway.

Finally, the Employer provides the drivers with a place to work. Specifically, the drivers are required to report to the DHL terminal facility to load and unload their vehicles at the beginning and end of each work day. The Employer also provides defined DHL routes to the drivers. Again, there is no evidence that the drivers can adjust or change their assigned routes.

6. The length of time for which the drivers are employed.

The drivers' contracts are indefinite, as the drivers are hired for a specified period of time, after which the contract continues indefinitely until it is terminated by either party. This arrangement is comparable to an employee who is hired by an employer and works a set probationary period, after which the parties maintain a relationship until one of the parties chooses to sever the employment relationship. Thus, the indefinite employment duration here supports a finding of employee status.

7. The method of payment used.

The drivers here are not paid by the job or by the number of packages they pick up or deliver on their route. Instead, they are paid a flat daily rate and they are required to submit their

[7] Three of the owner-drivers purchased their delivery vehicles in the last three weeks. The remaining two drivers owned their vehicles for at least a year.

manifests for payment to the Employer every Monday.[8] This differs from the drivers in Argix, who were not paid an hourly rate or salary and did not have a guaranteed income. In addition, although drivers here can pick up extra routes or work from the Employer, that circumstance is similar to an employee's volunteering for overtime in the typical employer-employee setting.

8. Whether the drivers' work is part of the Employer's regular business.

There is no question that the drivers' work, which includes the delivery and pickup of various packages, is part of the Employer's regular business, as the Employer stipulated at hearing that it brokers and manages a route pickup service for DHL.

9. Whether the parties believe they are creating an independent contractor arrangement.

The drivers and Employer entered into an ICA, which contains language reflecting an independent contractor relationship. However, the Board has held that the fact that the written agreement defines the relationship as one of "independent contractor" is not in itself dispositive of the ultimate issue. Argix, 343 NLRB No. 108, slip op. at 6; Big East Conference, 282 NLRB 335, 345 (1986).

10. Whether the Employer is in the business of delivering packages.

As set out above, the Employer stipulated at hearing that it is in the business of contracting with entities to provide delivery and pickup services.

C. Concluding Analysis

The foregoing factor analysis militates toward a finding that the drivers are employees, rather than independent contractors. In that regard, the Employer exercises control over the details of the drivers' work; the drivers do not operate their own distinct businesses; the work of

[8] During the hearing, a driver testified that he earns $160.00 per day, except Saturdays, with full payment for the regular five work days made every Friday.

delivering packages is not normally performed by a specialist, nor does it require specialized skills; the Employer provides a majority of the drivers with their vans and provides all drivers their place of work; the drivers are employed for an indefinite time; the drivers are paid a flat rate for their route work; and the drivers' work is part of the Employer's overall business of package delivery.

In addition to the foregoing factors, the Board has examined whether the drivers at issue have a proprietary interest in their routes. The relevant inquiry in this regard is whether the drivers can "influence their income through their own efforts or ingenuity." Roadway, 326 NLRB at 852. The Employer argues here that the drivers' proprietary interest in their routes is established through ownership of their vans. The Board eschewed this argument in Roadway when, after examining whether the drivers had the opportunity to increase their compensation by engaging in entrepreneurial activity related to their routes, the Board concluded that the drivers had "no substantial proprietary interest beyond their investment in their trucks." Roadway, 326 NLRB at 850. The record does not establish here that the drivers as a group have any meaningful opportunity to enhance income from their routes through "their own efforts or ingenuity." Rather, their pay is based on a flat rate, which is not based on the job or the volume of packages.

It is true that there are indicia of independent contractor status here, that is, sole responsibility for government contributions, the absence of benefits, the drivers' ability to hire their own helpers or employees, and the absence of any progressive discipline system. I find, however, that an assessment of all the factors here weighs more strongly in favor of finding the drivers to be employees within the meaning of Section 2(3) of the Act.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time delivery drivers employed by the Employer performing DHL contracting services out of the DHL facility in Morrisville, North Carolina, but excluding all other drivers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local 391, a/w International Brotherhood of Teamsters, AFL-CIO. The date time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to the Decision.

A. Voting Eligibility

Eligibility to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employee who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 395 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB

359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting processes, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 4035 University Parkway, Suite 200, P.O. Box 11467, Winston-Salem, North Carolina, 27116-1467, on or before **May 2, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (336) 631-5210. Since the list will made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

received by the Board in Washington by **May 9, 2005**.

Dated at Winston-Salem, North Carolina, this 25th day of April, 2005.

/s/ Willie L. Clark, Jr.
Willie L. Clark, Jr.
Regional Director
National Labor Relations Board
Region 11
4035 University Parkway, Suite 200
P. O. Box 11467
Winston-Salem, North Carolina 27116-1467